

The Choice of Our Time

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Maximilian Steinbeis
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Earlier this week, when the UK election result was still a feared future and not a horrific present, there was a minor scandal in Brussels over Viktor Orbán's government spokesman Zoltán Kovács. The occasion was a hearing in the EU Council on the independence of the judiciary, media and academia in Hungary in connection with the ongoing Article 7 procedure. The meeting was not open to the public – at least that was what they thought, had it not been for brave Spokesman Kovács who was busy tweeting live from the meeting room. I was sitting at my desk in Berlin, and every few minutes an update from Brussels popped up on my screen: Vera Jourová and Didier Reynders of the new EU Commission, Sweden, France, Denmark, Luxembourg, the Netherlands, Portugal, Germany, Italy, Slovenia ("Even Slovenia is worried..."), Spain, Ireland, one after the other joined the queue to slap the Magyar government in the face, it was almost too hard to watch. A bit like following the Euro qualifier game Armenia v. Italy (final score 1:9) live on Radio Yerevan.

Why on earth did he do that? The fellow holds the rank of an undersecretary of state, I believe. His one job is to make his government look good abroad. And there he goes and texts live and in flagrant disregard of all procedural rules from a closed meeting how his government receives a drumming of epic proportions, whining all the way about the baseness of the Finnish Presidency, about the sloppy handling of the agenda, about questions that have allegedly already been answered before, about the Dutch worrying about the Constitutional Court when they don't even have one themselves, on and on and on he went... His crowning achievement was to invent a special hashtag to accuse the entire EU of fiddling to the score of the great Jewish uber-bogeyman: #SorosOrchestra. Mind you: the guy tweets in English, not in Hungarian. He is in charge of external communications and responsible for Hungary's image abroad. What was he thinking? Who was he trying to impress?

Constitutional hardball

But first to Great Britain. Boris Johnson has won, overwhelmingly so. The election campaign has been awful, but nowhere near the measure of dread and dismay the UK and Europe will have to endure during the next five years and possibly long beyond. That Johnson would lie in such a unspeakable manner as he did was to be expected, of course, since he has done little else since he first caught our attention. But that it didn't matter for the electorate, that it didn't hurt him at all, that his blatant lack of trustworthiness was once again such a complete and utter non-factor in this seminal election – call me naive, but even in the year 3 after Brexit and Trump I still have a hard time to wrap my head around that astonishing fact.

Zeitschrift für Parteienwissenschaften (MIP) jetzt neu als Online-Magazin!

Die vom Institut für Deutsches und Internationales Parteienrecht und Parteienforschung (PRuF) herausgegebene halbjährlich erscheinende interdisziplinäre Zeitschrift für Parteienwissenschaften ist ab jetzt online auf einer neuen Homepage kostenlos für Sie verfügbar: <https://mip.pruf.hhu.de/index>. Alle Beiträge sowie Informationen über die Zeitschrift stehen online für Sie bereit.

The lawyer and FT columnist David Allen Green, one of Britain's best constitutional journalists, published a blog post the day before the election which I find very enlightening. He describes how the Tories turned from a party of calm, consistent constitutionalism into a reason for "genuine concern for all who care about the Constitution of the United Kingdom". The interesting thing is that he dates this change well before the Johnson era. Even before the May era. This happened in the time of David Cameron:

Under David Cameron and his immediate predecessors, the Conservatives shifted to explicit but hostile ideological positions on constitutional issues complemented by casual disdain.

Cameron, for example, insisted that the United Kingdom should repeal the Human Rights Act as a matter of principle.

When Cameron was faced with a defeat in the House of Lords in respect of a welfare proposal that was then dropped, he threatened to "reform" the upper house.

And when faced with a Speaker of the House of Commons who was not sufficiently obliging to the Conservatives, Cameron and his colleagues sought to get the Speaker replaced.

What Green describes here is similar to the "constitutional hardball" Mark Tushnet observed already 15 years ago in the USA, long before Trump either. Every constitution rests on a bed of mostly unwritten rules of political fairness which keep the co-existence and competition of divergent political opinions functional in practice – things you simply don't do, not because it's illegal but because it would be silly, democracy wouldn't work otherwise and that's in no-one's interest. Since the mid-1990s, these rules of fairness have to a very large degree evaporated in US politics. Government shutdown, impeachment, filibustering, blocking legislation and nominations in Congress,

presidential executive orders – all these potential weapons existed before but were only used sparingly at best. That has obviously changed fundamentally. Whatever makes your opponent's life more miserable will be used to the very last inch.

The British constitution is peculiar in that it consists entirely of unwritten conventions and parliamentary legislation and is therefore much more at the mercy of the governing majority than pretty much anywhere else. Mercy will hardly be given much longer after Johnson's epic victory, though. The Tory campaign manifesto is quite outspoken on what will swiftly happen now. Page 48 envisions a comprehensive constitutional reform to readjust "the relationship between Government, Parliament and the courts," to bolster up the security apparatus and to "update" human rights, and to ensure that the judiciary is no longer "abused to conduct politics by another means or to create needless delays". In addition, and directly from the US Republicans' playbook, there will be a redrawing of the electoral district map and some tight new voter ID laws. That's what Johnson officially asked to be elected for, and was. I don't dare hope that it's just another lie.

Game without rules

Constitutional hardball is an extremely damaging business. It depletes a country's constitutional resources and withers democracy and grinds its institutions to dust. Why is it nevertheless so popular all over the world, and why at this particular point in time? Because of what we fight about in politics. That has changed. Back in the good old day of Social Democracy when politics was essentially about redistributing growth and welfare spending and lower taxes, playing hardball was unattractive. The white men on both sides did and could expect from each other a minimum of fairness which kept the prospect of being majoritized by the other reasonably affordable. They played constitutional softball and had a ton of fun while being at it, won some and lost some, and foul play and gamesmanship was very much frowned upon in general. Until one day the *Others* showed up right there on the field, the marginalized, sidelined and invisible ones, loudly clamouring for their human/environmental rights. How to play with those? What are the rules of this game? Can fairness still be expected? Or is that sort of conflict basically a matter of who bullies whom?

In the USA, Newt Gingrich came to the conclusion in the mid 1990s that this sort of conflict indeed *was* basically a matter of who bullies whom. The Democrats had turned liberal even in the South, Bill Clinton from Arkansas and his frighteningly smart wife Hillary were sitting in the White House, the rule of the white man appeared to be very much under threat. In Gingrich's view, fighting fairly in this sort of conflict just equalled losing. Being majoritized by these people did not appear reasonably affordable by a long shot. And the good thing about hardball: you can force it upon those liberal snowflakes who, more likely than not, suck at it anyway. And thereby deliver proof that the white man is still very much in power after all. That was *attractive*.

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Call for papers

International conference on 'The Rule of Law in the EU: Consensus and Discontent'

Florence, 11-12 June 2020

Between **11-12 June 2020**, the University of Portsmouth, jointly with the European University Institute and the KCL Centre of European Law will co-organise an International Conference entitled: '***The Rule of Law in the EU: Consensus and Discontent***' at the EUI, in Florence. The conference aims to explore new avenues to think about the nature, function and transformation of the Rule of Law within the European Union.

European **Commissioner Věra Jourová** and **Prof Kim Lane Scheppele** (Princeton University) will deliver keynote speeches alongside a group of esteemed invited speakers.

Call for papers: We would like to invite scholars, practitioners and institutional representatives to present their ideas in three thematic areas: (i) *the philosophical foundations of the RoL in supranational polities*; (ii) *the evolution, meaning and contemporary application of the RoL in the EUI*; and (iii) *the Rule of Law and the Union in the technological age*. More details about these themes and the application process can be found in the enclosed 'Call for papers'. The **deadline for abstract submission is 5 February 2020**.

The Call is available in the following link: <https://www.port.ac.uk/news-events-and-blogs/events/the-rule-of-law-in-the-eu>

INTERNATIONAL CONFERENCE

THE RULE OF LAW IN THE EU: CONSENSUS AND DISCONTENT

CALL FOR PAPERS

11-12 June 2020

European University Institute, Florence

Organisers: European University Institute; University of Portsmouth;
Centre of European Law at King's College London



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This game without rules is inherently anti-constitutional, and to an honest old constitutionalist like me it often looks utterly incomprehensible: What are they doing? What's wrong with those people? Do they really believe they'll get away with this? But Zoltán Kovács, the tweeting spokesman with his #SorosOrchestra hashtag, is completely

uninterested in convincing an honest old constitutionalist like me, that is the least thing he has on his mind. Boris Johnson doesn't believe for a second that anyone will ever believe that he even believes to be believed, and neither he nor his supporters could care less. Because all that counts is that Boris Johnson will do *anything*, lie or fraud or confidence trick, *anything at all* to GET BREXIT DONE, that gigantic empty signifier of all the frightened white man holds dear.

To regard the conflict between those white men and their Other as a matter of who bullies whom, and hardball to be the only game in town, is a choice you make, though. You can choose as well otherwise. You can place your bet on rules being adaptable. On constitutions becoming ever more robust, ever more able to accommodate new sorts of conflicts and make them solvable politically among the free and equal. It did work with conflicts of class and faith, after all, didn't it?

The biggest, most encompassing and most frightening Other is the environment, the Planet Earth, claiming its rights loud and clear in these times of climate change. There is also a choice. Many think there is none under the looming threat of the coming apocalypse. But there is. You can choose to believe that we're all going to die anyway and in the meantime it's all about who bullies whom and who gets away with as much as possible before it's all over, so it would be foolish to be among the bullied when you can also be a bully. (That, come to think of it, seems to me a rather solid definition of the word "fascist".)

From that point of view it is actually only consequent that it was the Polish PiS government who, at the EU summit this week, insisted on blocking the EU going climate neutral in 2050.

It's what they chose.

Thanks to Daniel Ziblatt whose lecture at the American Academy last week I owe many insights and inspirations to.

Burning the house down

Speaking of **Poland**: In the conflict with the EU over judicial independence and the rule of law, the PiS government has apparently decided to burn the house down. MARCIN MATCZAK describes how the Polish government is taking the conflict with EU law to ever further extremes. LAURENT PECH, KIM SCHEPPELE and WOJCIECH SADURSKI have drafted an open letter to the new President of the EU Commission, Ursula von der Leyen, calling on her to initiate a temporary injunction by the ECJ to stop the PiS government.

In **Hungary**, the Fidesz government will not stand idly by and let the opposition get their hopes up too much after they managed to snatch the municipal government in Budapest away from its rightful master. New legislation of parliamentary procedure will teach them their proper place, as VIKTOR KAZAI reports.

Both Hungary and Poland are subject to Article 7 proceedings in the **EU**, and in terms of constitutional law the institutional question of the role of the European Parliament in it is rather interesting, particularly since the Council firmly takes the view that its place is at the sidelines – a legal position which fails to convince LAURENT PECH, DIMITRY KOCHENOV and SÉBASTIEN PLATON.

The **British** election was marked by fake news and disinformation like few before it. NICOLAS HARDING and LENNART LAUDE examine the regulations which would have been in place in Germany and find them rather unsatisfactory.

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Established in 2009 and published by Cambridge University Press, the **European Journal of Risk Regulation (EJRR)** is a leading peer-reviewed interdisciplinary academic quarterly at the intersection of global law, science and public policy. The journal explores classic and emerging risk phenomena, ranging from disrupting technologies, environmental degradation, natural disasters to financial regulation, and algorithmic risks.

The **EJRR** invites proposals for special issues to be published end of 2020 and 2021.

Special issues feature six to eight contributions, plus an introduction and /or guest-editorial. Each manuscript has an indicative length of 8000 words, including footnotes.

Proposals should include:

- an outline of the special issue, describing the topic and why it is of interest to the EJRR readership;
- table of contents;
- short abstracts and two reviewer suggestions for each manuscript.

Documents can be sent to wirajendi@hec.fr for consideration.

Can mayors in **Germany** be obliged by law to shake hands with their Nazi council members? The Mayor of the Thuringian town of Eisenach, Katja Wolf, has refused any physical contact with hers, even though the law clearly states that she must confirm the office transfer to any council member by a handshake. SOPHIE SCHÖNBERGER, however,

points out that a municipal official is also a human being and a holder of fundamental rights with the right to decide about her own body and who gets to touch it and who doesn't.

Since 2016, **Turkey** has deprived hundreds of thousands of its citizens of their passports. ALI YILDIZ investigates how this fits in with Turkey's obligations under European human rights law.

In her campaign against hate speech on the Internet, the **German** Federal Minister of Justice wants to revive the abolished crime of supporting the "advocacy of crimes", a plan which AMÉLIE HELDT takes a critical view of.

Southeast Asia is currently perhaps the most interesting experimental laboratory for legislative measures against fake news. LASSE SCHULDT examines what is happening there.

LENNART KOKOTT reports on a little-noticed practice of the **German** Federal Office for the Protection of the Constitution: the screening of asylum seekers outside German territory on Malta and in Italy, the legality of which can be doubted for good reasons.

The **Italian** Constitutional Court has declared a regional anti-Mosque law unconstitutional. GIANCARLO ANELLO reports.

Once more the **German** Federal Minister of Justice: she wants to entrench children's rights in the Basic Law. FRIEDERIKE WAPLER thinks little of her bill.

Elsewhere

EMRE TURKUT analyses the ECtHR judgement on the detention of the **Turkish** philanthropist Osman Kavala.

GAUTAM BHATIA is concerned about the use that the **Indian** Supreme Court is making of his new "manifest arbitrariness" doctrine.

ANDREA SAMARDZIJA examines the under-representation of women in **international** courts.

MARIUSZ JAŁOSZEWSKI describes the latest, mind-blowing escalation by the **Polish** government in the conflict with the ECJ over judicial independence: Judges who don't apply a Polish law because, for example, it is contrary to European law, or who question the legality of the appointment of PiS-controlled judges, might be removed from office.

ANTONIOS KOUROUTAKIS is concerned about the paradox that **EU** citizens forfeit their right to vote in national elections if they exercise their right to free movement.

That's all for this week.

Your long-considered but never actually grasped chance to join the august community of Verfassungsblog supporters is waiting for you [here](#). 263 of you have actually done so yet, which is fantastic on the one hand but still a somewhat smallish group in relation to the the number of our regular readers on the other. Anyway: do join and become our supporter No. 264 and receive our warmest gratitude!

Next week there'll be one last end-of-year editorial for 2019 before I take a little break for a few weeks. Meanwhile, all the best and take care,

Max Steinbeis



While you are here...

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All the best, *Max Steinbeis*

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